

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 99-10912-JMD
Chapter 7

Vivian F. Green,
Debtor

Robert A. Muller,
Plaintiff

v.

Adv. No. 99-1114-JMD

Vivian F. Green,
Defendant

Michael S. Ritchie, Esq.
GASPAR & RITCHIE
Attorney for Plaintiff

Grenville Clark III, Esq.
GRAY, WENDELL & CLARK
Attorney for Defendant

MEMORANDUM OPINION

I. INTRODUCTION

The plaintiff, Robert A. Muller (“Mr. Muller”), filed a complaint seeking to except from discharge a property settlement obligation of the defendant, his former spouse, Vivian F. Green (“Ms. Green” or the “Debtor”), pursuant to 11 U.S.C. § 523(a)(15). The Court held a trial of this matter on December 16, 1999. Both parties testified and presented documentary evidence.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The parties were married on May 5, 1984 and divorced on May 22, 1998. In March 1998, the parties entered into a permanent stipulation that resolved most of the issues in their divorce. This permanent stipulation was incorporated into the final divorce decree that issued from the Hillsborough County Superior Court in May 1998 (the “Divorce Decree”).

Pursuant to the Divorce Decree, Ms. Green was awarded the marital home and was ordered to pay Mr. Muller \$10,500.00 for his interest in the home, with \$5,000.00 due on April 30, 1998 and the balance of \$5,500.00 due on December 31, 1998. In August 1998, Ms. Green paid Mr. Muller \$3,000.00. The balance of the first installment, \$2,000.00, was set off by the parties as Ms. Green loaned money to and paid expenses on behalf of Mr. Muller between February 1998 and July 1998, while Mr. Muller continued to reside in the marital home. Ms. Green did not make the December 1998 payment of \$5,500.00.

On December 23, 1998, Mr. Muller filed Chapter 7 bankruptcy. He listed Ms. Green’s obligation to him as an asset on Schedule B and claimed it as exempt in Schedule C pursuant to 11 U.S.C. § 522(d)(5). On April 7, 1999, Mr. Muller received a discharge of his personal obligation on the marital home mortgage and approximately \$33,000.00 in unsecured claims consisting mostly of credit card debt and medical bills.

On March 19, 1999, Ms. Green filed her own Chapter 7 bankruptcy, primarily because of a shift in liability for the marital debt caused by Mr. Muller’s bankruptcy. On June 17, 1999, Mr. Muller filed the instant action seeking a determination by the Court that Ms. Green’s obligation to him is excepted from discharge. On June 30, 1999, Ms. Green was discharged of her personal obligation on the marital home mortgage and her unsecured credit card debt, personal loans, and medical bills in the approximate amount of \$21,000.00, excluding her \$5,500.00 obligation to Mr. Muller.

III. DISCUSSION

At issue in this case is whether the Debtor's obligation to pay Mr. Muller \$5,500.00 for his remaining equitable interest in the marital home is dischargeable. The parties agree that section 523(a)(15) applies as the debt was incurred in connection with the property settlement of their divorce. Section 523(a)(15) specifically provides:

A discharge . . . does not discharge an individual debtor from any debt . . . not of a kind described in paragraph (5) [relating to alimony, maintenance, and support] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such a debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15). The party seeking a nondischargeability finding under section 523(a)(15) bears the ultimate burden of persuasion. See Garrity v. Hadley (In re Hadley), 239 B.R. 433, 437 (Bankr. D.N.H. 1999). The debtor, however, bears the burden of production under section 523(a)(15)(A) because, in general, debtors are in a better position to provide evidence concerning their ability to pay. See id.

A. Ability to Pay

The Court must determine whether Ms. Green's remaining property settlement obligation to Mr. Muller can be paid from income or property that is not reasonably necessary to be expended for her maintenance and support. See 11 U.S.C. § 523(a)(15)(A). In determining Ms. Green's ability to pay the debt at issue from her income, it is appropriate to examine her "disposable income" within the meaning of

11 U.S.C. § 1325(b)(2), as of the time of trial. See Hadley, 239 B.R. at 437; Brasslett v. Brasslett (In re Brasslett), 239 B.R. 177, 183 (Bankr. D. Me. 1999).

Ms. Green testified at trial that she earns \$44,000.00 per year, resulting in gross income of \$3,666.67 per month. She also testified that her monthly expenses total \$3,865.59. This evidence suggests that Ms. Green experiences a monthly shortfall of \$198.92 and lacks the ability to pay Mr. Muller the debt at issue from her income. Pursuant to section 523(a)(15)(A), the Court is required to consider only those expenses that are “reasonable necessary” to be expended for the Debtor’s support. See Hadley, 239 B.R. at 438.

At trial, Ms. Green submitted current income and expense information and testified about her increased income and expenses since the filing of her bankruptcy petition on March 19, 1999. The evidence shows that when the Debtor earned \$3,293.34 per month working in marketing and public relations for the same employer where she now works, she had monthly expenses of \$3,281.91 including payroll deductions. Since receiving a promotion and an increase in pay of \$373.33 per month in July 1999, her expenses have increased by more than 150% of the amount of her raise, or by \$583.68 per month.

In determining “disposable income,” the Court will not engage in a detailed review of the necessity and level of each expense item. Such an exercise would place an impossible burden on the Court to determine the absolute necessity of each item. It would also require the Court to make judgments on the “value” of numerous individual lifestyle decisions by a debtor or other parties involved in this type of litigation. However, when evidence is presented suggesting an obvious indulgence in luxuries, or where a debtor or other party has recently made major changes in lifestyle or other expenses, the Court will explore the necessity and propriety of such expense items. In this case, the Debtor has made allegations and presented evidence with respect to significant changes in her expenses since the petition date. After reviewing the Debtor’s expense increases, the Court finds that the evidence does not adequately explain or support the necessity of some of these increases.

Prior to July 1999, Ms. Green was employed as a contract worker and did not have any health insurance. Her bankruptcy schedules disclosed that she expended \$100.00 per month for medical and dental expenses. Ms. Green now has health insurance for which she pays \$52.61 per month. However, instead of decreasing, Ms. Green's medical and dental expenses have increased to \$120.00 per month, plus her share of the insurance, for a total of \$172.61 per month. In other words, Ms. Green's medical and dental expenses have increased 73% since obtaining health insurance. The Debtor testified that she has prescription drug expenses and deductibles to pay; however, she did not testify to any deterioration in her health since March 1999.

Ms. Green also claimed \$433.00 per month for food expenses for a family of one in her original Schedule J and at the time of trial. Ms. Green testified that this figure includes food for her three cats and a dog. In Exhibit 108, the Debtor listed "pet food" as a new budget item and at trial she explained that \$30.00 per month is the cost of special diet food for her dog which is suffering from a kidney ailment. However, the Debtor did not make a corresponding reduction in the food expense line item. Ms. Green provided no other explanation for what appears to be a large food expense for a single person other than the inclusion of pet food expenses.

The Debtor's automobile insurance expense has increased since her bankruptcy filing. Her automobile insurance expense of \$80.00 per month in March 1999 has now increased to \$100.00 per month, or \$1,200.00 per year. This amount is excessive given that her car is eleven years old, has over 168,000 miles, and, at the time of trial, was not even being used by Ms. Green. The Debtor did not offer any explanation for either the increased automobile insurance expense or the high cost that was originally claimed. The Court does not find Ms. Green's justification for the level of the car insurance expense to be credible.

Ms. Green also testified to the necessity for several other increases in expenses. Ms. Green testified that she is paying \$250.00 per month for legal fees related to this bankruptcy litigation. At the rate of

\$250.00 per month, the Debtor should be able to pay these legal fees within a year or so. The Court finds that the Debtor's monthly expense for legal fees is not a long-term expense.

Ms. Green also testified to increases in clothing (\$70.00) and personal grooming (\$45.00) expenses totaling \$115.00 per month, or nearly one third of her \$373.33 increase in salary. She testified that the increase in these expenses was required by her new position. Ms Green testified that her new position requires her to travel to various business locations and third party offices to represent her employer. However, Ms. Green has been working for her current employer since 1998, and she previously worked for another institution in the same field in similar positions. The testimony did not establish the necessity for a person, who has been in the work force for a substantial period of time and previously needed professional attire, to increase her clothing and personal grooming expenses by 480% in connection with a new position that increased her gross income by only 11%. The evidence does not support the necessity of a \$70.00 increase in such expense. The Court finds that an increase of \$30.00 per month, or 100%, from the level in March 1999 is reasonably necessary.

The evidence did support other increases in the Debtor's expenses since March 1999. In the Court's view, Ms. Green's testimony did justify increased monthly expenses for laundry and dry cleaning (\$18.00), transportation (\$100.00), veterinary care (\$33.33) and retirement (\$100.00). Thus, taking all of the Debtor's income and expense items together, the Court finds that Ms. Green's monthly disposable income for purposes of determining her ability to pay under section 523(a)(15)(A) is the amount shown in Exhibit 108, less the increases in expenses that the Court finds are not supported by the evidentiary record as being necessary for the Debtor's support. According to this calculation, the Debtor's disposable income should be \$258.69.¹ While the Debtor's need to pay legal fees may make it impossible for her to meet her

¹ The calculation is as follows:

Gross Income (Exhibit 108)	\$3,666.67
Payroll Deductions and Expenses (Exhibit 108)	<u>\$3,865.59</u>
Net Disposable Income (Exhibit 108)	(\$ 198.92)

property settlement obligation to Mr. Muller from her income in the immediate future, she should have sufficient resources to cover her monthly expenses and to make payments on her obligation to Mr. Muller on some type of installment basis in the near future. See Hastings v. Konick (In re Konick), 236 B.R. 524, 529 (B.A.P. 1st Cir. 1999) (“[C]ourts may consider the debtor’s future earning capabilities and long-term financial prospects, particularly where the claim is to be paid incrementally over a period of time.”); Migneault v. Migneault, No. 98-CV-498-B, 1999 WL 1027052 (D.N.H. May 18, 1999) (indicating that it is appropriate to consider a debtor’s earning capacity when evaluating an inability to pay claim).

With respect to whether Ms. Green has the ability to pay the debt to Mr. Muller from property not reasonably necessary for her support, the Court notes that the marital home is worth somewhere between \$135,000.00 and \$143,000.00. Ms. Green testified that the outstanding balance on the mortgage is \$109,000.00. Accordingly, there is somewhere between \$26,000.00 and \$34,000.00 in equity in the marital home. While Ms. Green testified that she does not believe she can obtain a second mortgage on her house or refinancing because of her bankruptcy filing, the Debtor failed to introduce any evidence that she has attempted to do either. Ms. Green failed to establish that she lacks an ability to obtain a second mortgage or refinance the marital home in order to pay Mr. Muller \$5,500.00.

For these reasons, the Court finds that Ms. Green has the ability to pay the obligation to Mr. Muller from income and property not reasonably necessary for her support. Since Ms. Green has not met her burden of going forward with sufficient evidence to establish her inability to pay, Mr. Muller has satisfied his burden of persuasion under section 523(a)(15)(A).

Plus adjustments in accordance with this opinion:

Medical insurance and expenses	\$ 72.61	
Food Expenses	\$ 30.00	
Automobile Insurance	\$ 20.00	
Legal Expenses	\$ 250.00	
Clothing and Grooming	\$ 85.00	
Total Adjustments		<u>\$ 457.61</u>
Monthly Disposable Income		\$ 258.69

B. Balancing Test

Pursuant to section 523(a)(15)(B), Mr. Muller must establish that discharging the debt will result in a detriment to him that outweighs the benefit to Ms. Green. This is the so-called “balancing test” of section 523(a)(15). See Hadley, 233 B.R. at 439. In conducting this test, it is appropriate to consider the totality of the circumstances and the equities of the case. See Humiston v. Huddelston (In re Huddelston), 194 B.R. 681, 689 (Bankr. N.D. Ga. 1996).

Looking at the parties’ financial circumstances as a whole, the Court finds that each party’s financial situation is improving. Both have recently filed bankruptcy and have received a discharge of considerable debt, including credit card obligations, medical bills, and personal loans. In addition, both parties have secured promising jobs, after experiencing periods of unemployment. Ms. Green now earns \$44,000.00 per year; Mr. Muller earns \$53,000.00 per year. The Court finds that the parties’ earnings should cover their reasonable and necessary living expenses.

Ms. Green testified that she needs a new automobile in the very near future and that she is currently borrowing a relative’s car. Ms. Green testified that her automobile is twelve years old, has over 168,000 miles on the odometer, and cannot currently be used due to a broken clutch. Mr. Muller also testified that he needs a new car. His automobile is nine years old and has over 203,000 miles. The Court finds that both parties need vehicles for employment purposes and that neither is in a better position regarding their current ability to purchase a new car.

Despite the similarities in Ms. Green’s and Mr. Muller’s current financial circumstances, the Court finds that there is one factor distinguishing the parties: their respective housing situations. Mr. Muller lives at home with his parents in Meredith, New Hampshire, while Ms. Green continues to reside in the marital home in Manchester. The Court agrees with Mr. Muller that he would benefit greatly from the receipt of the \$5,500.00 as he could use the money either to put a deposit on an apartment or a down payment on a house closer to his employment in Nashua. These funds would be Mr. Muller’s only significant asset. Ms. Green, on the other hand, has equity of at least \$26,000.00 in the marital home. In this respect, she is in a

much better financial position than Mr. Muller. For this reason then, the Court finds that the balancing test of section 523(a)(15)(B) tips in Mr. Muller's favor.

IV. CONCLUSION

Because Mr. Muller has satisfied his burden under section 523(a)(15), Ms. Green's obligation to pay Mr. Muller \$5,500.00 for his remaining equitable interest in the marital home is nondischargeable. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 25th day of January, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge